83-96

Case No. _____

IN THE

Supreme Court of the United States

OCTOBER TERM 1982

JOANNE LIMBACH,
TAX COMMISSIONER OF OHIO,
Petitioner,

v.

THE HOOVEN & ALLISON COMPANY,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO
THE SUPREME COURT OF OHIO

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

I. WHETHER THE STATE OF OHIO CAN IMPOSE ITS NONDISCRIMINATORY AD VALOREM PROPERTY TAX ON IMPORTED RAW MATERIALS NO LONGER IN TRANSIT WHICH ARE RETAINED IN THEIR ORIGINAL PACKAGES AND HELD FOR USE IN MANUFACTURE IN OHIO WITHIN THE STRICTURES OF THE IMPORT-EXPORT CLAUSE OF THE UNITED STATES CONSTITUTION, ART. I, § 10, cl. 2.

II. WHETHER THE DECISION OF THIS COURT IN *MICHELIN TIRE CORP. v. WAGES*, 423 U.S. 276 (1976), EFFECTED A CHANGE IN THE CONTROLLING LEGAL PRINCIPLES APPLICABLE TO A DETERMINATION OF WHETHER OHIO'S ASSESSMENT OF ITS AD VALOREM PROPERTY TAX AGAINST IMPORTED RAW MATERIALS VIOLATES THE IMPORT-EXPORT CLAUSE.

III. WHETHER SUBSEQUENT TO *MICHELIN* THE DECISION OF THIS COURT IN *HOOVEN & ALLISON CO. v. EVATT*, 324 U.S. 652 (1945), RETAINS ANY VITALITY REGARDING THE ABILITY OF THE STATES TO TAX IMPORTED RAW MATERIALS.

IV. WHETHER COLLATERAL ESTOPPEL MAY BE APPLIED WHEN IT WOULD RESULT IN ONE MANUFACTURER BEING PERPETUALLY IMMUNE FROM OHIO'S AD VALOREM PROPERTY TAX ON ITS IMPORTED RAW MATERIALS WHILE ALL OTHER BUSINESSES' IMPORTED GOODS, INCLUDING RAW MATERIALS, WOULD BE SUBJECT TO THAT TAX BECAUSE OF A SUBSEQUENT CHANGE IN THE CONTROLLING LEGAL PRINCIPLES APPLICABLE TO

IMPORT-EXPORT CLAUSE CASES ENUNCIATED IN AN INTERVENING DECISION OF THIS COURT.

PARTIES

The petitioner in this action is Joanne Limbach in her capacity as Tax Commissioner of Ohio. She is the successor to Edgar L. Lindley who in his capacity as Tax Commissioner of Ohio was a party to the proceedings below. The respondent is The Hooven & Allison Company.

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The Opinion of the Ohio Supreme Court is reported at *Hooven & Allison Company v. Lindley*, 4 Ohio St. 3d 169, 447 N.E. 2d 1295 (1983). (A–2). The Decision and Order of the Ohio Board of Tax Appeals is unreported. (A–10).

JURISDICTION

The Opinion of the Ohio Supreme Court was entered as its judgment on April 20, 1983 (A – 2) and this Petition for Certiorari was filed within 90 days of that date. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257 (3).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves Article I, § 10, cl. 2 of the United States Constitution, and Ohio Revised Code (R.C.) sections 5709.01, 5711.01 (A) and 5711.16

Article I, § 10, cl.2 of the United States Constitution:

> No State shall, without the Consent of the Congress, lay any Imposts or Duties on Imports or Exports, except what may be absolutely necessary for executing its inspection Laws: and the net Produce of all Duties and Imposts, laid by any State on Imports or Exports, shall be for the Use of the Treasury of the United States; and all such Laws shall be subject to the Revision and Controul of the Congress.

R.C. § 5709.01:

> All real property in this state is subject to taxation, except only such as is expressly exempted therefrom. All personal property located and used in business in this state, and all domestic animals kept in this state and not used in agriculture, except unmanufactured tobacco which shall be exempt from taxation for state purposes to the extent of the value, or amounts, of any unpaid nonrecourse loan or loans thereon granted by the United States government or any agency thereof, are subject to taxation, regardless of the residence of the owners thereof. All ships, vessels, and boats, and all shares and interests therein, defined in section 5701.03 of the Revised Code as

personal property and belonging to persons residing in this state and not used in in business wholly in another state, other than aircraft licensed in accordance with sections 4561.17 to 4561.21, inclusive, are subject to taxation. All property mentioned as taxable in this section shall be entered on the general tax list and duplicate of taxable property.

R.C. § 5711.01 (A):

(A) "Taxable property" includes all the kinds of property, except real property mentioned in section 5709.01 and 5709.02 of the Revised Code, and also the amount or value as of the date of conversion of all taxable property converted into bonds or other securities not taxed on or after the first day of November in the year preceding deposits after the date of which deposits are required to be listed in such year, except in the usual course of the taxpayer's business, to the extent he may hold or control such bonds, securities, or deposits on such day, without deduction for indebtedness created in the purchase of such bonds or securities from his credits; but taxable property does not include such investments and deposits as are taxable at the source as provided in sections 5725.01 to 5725.26 of the Revised Code, nor surrender values under policies of insurance.

R.C. § 5711.16:

A person who purchases, receives, or holds personal property for purpose of adding to its value by manufacturing, refining, rectifying, or combining different materials with a view of making a gain or profit by so doing is a manufacturer. When such person is required to return a statement of the amount of his personal property used in business, he shall include the average value, estimated as provided in this section, of all articles purchased, received, or otherwise held for the purpose of being used, in whole or in part, in manufacturing, combining, rectifying, or refining, and of all articles which were at any time by him manufactured or changed in any way, either by combining, rectifying, refining or adding thereto, which he has on hand during the year ending on the day such property is listed for taxation annually, or on the part of the year during which he was engaged in business. He shall separately list finished products not kept or stored at the place of manufacture or at a warehouse in the same county.

The average value of such property shall be ascertained by taking the value of all property subject to be listed on the average basis, owned by such manufacturer on the last business day of each month the manufacturer was engaged in business during the year. The result shall be the average value to be listed. A manufacturer shall also list all engines and machinery, and tools and implements, of every kind used, or designed to be used, in refining and manufacturing, and owned or used by such manufacturer.

NO._____

IN THE
SUPREME COURT OF THE UNITED STATES

JOANNE LIMBACH,
TAX COMMISSIONER OF OHIO,
Petitioner,

v

THE HOOVEN & ALLISON COMPANY
Respondent

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF OHIO

Petitioner, the Tax Commissioner of Ohio, respectfully prays that a Writ of Certiorari issue to review the judgment and opinion of the Supreme Court of Ohio entered in this case.

STATEMENT OF THE CASE

Petitioner, the Tax Commissioner of Ohio, assessed ad valorem personal property taxes under R.C. Chapter 5711 against certain raw materials imported by respondent, The Hooven & Allison Co., from various foreign countries and retained in their original packages by respondent in its warehouse in Ohio for their intended use by respondent in the manufacture of cordage.

In its Inter-County Corporation Returns of Taxable Property for return years 1976 and 1977, respondent had deducted imported raw materials retained in their original packages from its manufacturing inventory, giving the following explanation:

> The inventories represent fibres imported by the taxpayer from foreign countries, held in the original packages in its warehouse in Xenia prior to being used in manufacturing cordage, and when they are removed therefrom or placed in the production line in the factory, such imported fibres so used, or removed from the original package, are thereupon transferred to the Goods in Process, and are included in the taxable inventories in Xenia City.

Subsequent to the assessment, respondent filed an application for review and redetermination of the assessment, arguing that the Import-Export Clause of the United States Constitution precludes, and the decision of this Court in *Hooven & Allison Co. v. Evatt*, 324 U.S. 652 (1945) (hereinafter *Hooven I*) collaterally estops, the Tax Commissioner from levying Ohio's ad valorem personal property taxes upon the subject imported raw materials. In the

Certificate of Determination affirming the assessment, the Tax Commissioner rejected respondent's arguments on the basis of this Court's decision in *Michelin Tire Corp. v. Wages*, 423 U.S. 276 (1976). The Certification of Determination is set forth in full in the Decision and Order of the Board of Tax Appeals (A – 11).

Respondent appealed to the Ohio Board of Tax Appeals from the Tax Commissioner's Certificate of Determination specifying the following errors, *inter alia*, in its notice of appeal:

> 2. The Commissioner erroneously determined that the State of Ohio was not collaterally estopped by the United States Supreme Court decision in *The Hooven & Allison Co. v. Evatt*, 324 U.S. 652 (1945) from assessing the Appellant's imported raw materials inventory retained in its original packages on tax-listing date.
>
> 3. The Commissioner erroneously determined that the levying of Ohio's personal property tax upon Appellant's imported raw materials inventory retained in its original packages on tax-listing date does not impair the federal government's regulation of foreign trade in contravention of the "Import-Export" clause, or of the Commerce clause of the United States Constitution.

The Board of Tax Appeals held that the Tax Commissioner was collaterally estopped by the decision of this Court in *Hooven I*. Although the Tax Commissioner, relying on this Court's decision in *Commissioner v. Sunnen*, 333 U.S. 591 (1948), argued before the Board of Tax Appeals that collateral estoppel was inapplicable because the legal principles upon which *Hooven I* was based had been abandoned by the decision of this Court in *Michelin Tire Corp. v. Wages, supra*, the Board's de-

cision contained no reference to that decision or its effect on the application of collateral estoppel based on *Hooven I*. The Board of Tax Appeals did not consider the constitutional issues raised by respondent, stating that it lacked jurisdiction to determine those issues. (A—10).

Respondent filed a notice of appeal from this decision to the Ohio Supreme Court to secure a determination on its constitutional claims. The Tax Commissioner filed a notice of appeal from the decision to the Ohio Supreme Court, specifying the following error:

> The Board erred in holding that the Tax Commissioner is collaterally estopped by the decision of the United States Supreme Court in *Hooven & Allison Co. v. Evatt*, 324 U.S. 652 (1945), from assessing the personal property tax for the tax years 1976 and 1977 on taxpayer's imported raw materials inventory retained in its original packages on tax listing day and, based on such holdings, deciding that the final determination of the Tax Commissioner in issue in BTA Case Nos. 79-C-637 and 79-C-638 should be reversed.

The Tax Commissioner argued before the Ohio Supreme Court that this Court's decision in *Michelin* so changed the legal principles controlling in Import-Export Clause cases as to render the doctrine of collateral estoppel inapplicable relying on this Court's decision in *Commissioner v. Sunnen*, *supra*.

The Ohio Supreme Court rejected the Tax Commissioner's argument that collateral estoppel was in inapplicable because *Michelin* had repudiated the "original package" doctrine upon which *Hooven I* was based and affirmed the decision of the Board of Tax Appeals that the Tax

Commissioner was collaterally estopped from assessing respondent's imported raw materials. Having held that the Tax Commissioner was barred by the doctrine of collateral estoppel from levying Ohio's ad valorem personal property tax on respondent's imported raw materials, the Ohio Supreme Court declined to address the constitutional issues raised by respondent in its appeal. (A –2).

This Petition has followed.

ARGUMENT IN SUPPORT OF ALLOWING WRIT OF CERTIORARI

1. The Decision of the Ohio Supreme Court Below Conflicts With This Court's Decision in *Michelin Tire Corp. v. Wages*

The decision of the Ohio Supreme Court that petitioner was collaterally estopped from assessing Ohio's ad valorem personal property tax against respondent's imported raw materials was apparently based upon its holding that the decision of this Court in *Hooven I*, in which such goods were held to be immune from that tax under the "original package" doctrine, was of continued vitality subsequent to this Court's decision in *Michelin Tire Corp. v. Wages*, 423 U.S. 276 (1976). That holding is in direct conflict with the *Michelin* decision.

For over a century following this Court's decision in *Low v. Austin*, 80 U.S. (13 Wall.) 29 (1872), wherein the "original package" doctrine was spawned, the Import-Export Clause was viewed as a broad prohibition against all taxes on imports. *Washington Revenue Dept. v. Association of Washington Stevedoring Cos.*, 435 U.S. 734, 752 (1978); P. Hartman, *Federal Limitations on State and Local Taxation* § 5:2, at 192-193, § 5:4, at 199; W. Hellerstein, *State Taxation and the Supreme Court: Toward a More Unified Approach to Constitutional Adjudication?*, 75 Mich. L. Rev. 1426 (1977). The primary consideration in such cases was whether the challenged tax reached imports; the question to be decided was whether the goods had lost their status as imports. *Washington Revenue Dept. v. Association of Washington Stevedoring Cos.*, *supra.*, at 752, 760. Until *Michelin*, imported goods retained their status as imports so long as they remained in their original packages, and as imports they were considered to be im-

mune from all forms of state taxation under the Import-Export Clause.

In *Michelin*, this Court expressly overruled *Low v. Austin*, *supra*, and abandoned the century-old "original package" doctrine along with the concept that the Import-Export Clause constituted a broad prohibition against all forms of state taxation which fall upon imports. 423 U.S., at 279, 290 and 301; *Washington Revenue Dept. v. Association of Washington Stevedoring Cos.*, *supra*, at 760; P. Hartman, *supra*, § 5:4 at 198-199; W. Hellerstein, *supra*, at 14.

This abandonment constituted an historic break from the controlling legal principles upon which the determinations regarding the application of the Import-Export Clause had been based. *Michelin* adopted a fundamentally different approach to Import-Export Clause cases. Rather than looking at whether the goods had lost their status as imports, the Court focused upon the nature of the tax being challenged to ascertain whether it was an "Impost or Duty" forbidden by the Import-Export Clause. *Washington Revenue Dept. v. Association of Washington Stevedoring Cos.*, *supra*, at 752; P. Hartman, *supra*, at § 5:4, at 198-199; W. Hellerstein, *supra*, at 1429-1430.

The *Michelin* Court looked to the purposes behind the inclusion of the Import-Export Clause in the Constitution and determined that nondiscriminatory state ad valorem property taxes were not the type of exactions the Framers of the Constitution considered as creating the three main concerns or evils the clause was intended to eliminate:

> Our independent study persuades us that a nondiscriminatory ad valorem property tax is not the type of state exaction which the Framers of the Constitution or the Court in *Brown* had in mind as being an "impost" or "duty" and that

> *Low v. Austin*'s reliance upon the *Brown* dictum to reach the contrary conclusion was misplaced. 423 U.S., at 283.

Having held that the prohibition of the Import-Export Clause was only against the laying of "Imposts or Duties," and that a nondiscriminatory state ad valorem property tax was not such an exaction, the Court held that irrespective of whether the tires had lost their status as imports, Georgia's assessment of its nondiscriminatory ad valorem property tax against the imported tires was not prohibited by the Import-Export Clause.

The *Michelin* Court's overruling of *Low v. Austin*, *supra*, was based upon a cogent historical analysis of the original purpose and scope of the Import-Export Clause and a very critical analysis of the "original package" rule as formalized in *Low v. Austin*. While the *Michelin* Court expressly overruled only *Low v. Austin*, which it considered to be the leading decision applying the "original package" rule, 423 U.S., at 282, its decision implicitly overruled all of the cases decided subsequent to *Low v. Austin* which applied the rationale of that case and unquestionably changed the controlling legal principles applicable in Import-Export Clause cases. Among such cases applying the "original package" analysis of *Low v. Austin* was *Hooven I*.

In its decision below, the Ohio Supreme Court held that *Michelin* had neither implicitly overruled *Hooven I* nor altered the legal principles upon which that decision was based. The Court expressly found that *Hooven I* retained its vitality even subsequent to *Michelin* and, based on that finding, rejected petitioner's argument based on *Commissioner v. Sunnen*, *supra*, that *Michelin* eviscerated the collateral estoppel effect of *Hooven I*.

The Ohio Supreme Court's reasoning in its attempt to distinguish *Michelin* and *Hooven I* reveals the Court's basic misunderstanding of this Court's decision in *Michelin*. The Ohio Supreme Court distinguished the two cases based on the factual distinctiveness of the goods involved and their status as imports and on language regarding *Hooven I* contained in this Court's decision in *Youngstown Sheet & Tube Co. v. Bowers* and *United States Plywood Corp. v. Algoma*, 358 U.S. 534 (1959), a decision which was rendered prior to *Michelin* and which was based upon the "current operational needs" doctrine which was merely another test formalized to determine whether the goods at issue had lost their status as imports.

This attempt to distinguish the two cases ignores the fundamentally different approach to Import-Export Clause cases initiated by this Court in *Michelin*. Whether the goods had lost their status as imports was the specific inquiry abandoned by *Michelin*; the Court expressly refrained from addressing that question because the relevant inquiry was no longer the nature of the goods but the nature of the tax at issue. *Washington Revenue Dept. v. Association of Washington Stevedoring Cos.*, *supra*, at 752, 760. Under "the central holding of Michelin that the absolute ban is only of 'Imposts or Duties' and not of all taxes,"*Id.*, at 759, the relevant inquiry is whether the tax at issue constitutes a prohibited "Impost" or "Duty." If the challenged tax is determined not to be an "Impost" or "Duty," it will not offend the Import-Export Clause even if the goods have not lost their status as imports.

Therefore, *Hooven I* may properly be distinguished from *Michelin* only if the nature of the taxes at issue in the two cases differed. In *Michelin*, this Court held

that a nondiscriminatory state ad valorem property tax was not an "Impost"or "Duty" and therefore was not barred by the Import-Export Clause. 423 U.S., at 283. In *Hooven I*, the Court held that a nondiscriminatory state ad valorem property tax could not be assessed against imported goods so long as those goods retained their status as imports. It cannot be disputed that the taxes at issue in *Michelin* and *Hooven I* were of the very same type. The only relevant distinction between the two cases is the fact that *Hooven I* invoked the "original package" doctrine of *Low v. Austin* in holding that Ohio could not levy its nondiscriminatory ad valorem property tax upon imported goods until they lost their status as imports and that this Court repudiated the "original package" doctrine in *Michelin*. However, rather than supporting the Ohio Supreme Court's finding that *Hooven I* is of continued vitality, this distinction conclusively establishes that *Hooven I* retains no more validity than did the decision formalizing the "original package" doctrine, *Low v. Austin*, which was expressly overruled in *Michelin*.

Any suggestion that *Hooven I* was not based upon the same legal principles as was *Low v. Austin* is simply spurious. A review of *Low* and *Hooven I* reveals that Hooven I relied on the same language of *Brown v. Maryland*, 25 U.S. (12 Wheat.) 419 (1827), and *The License Cases*, 46 U.S. (5 How.) 504, 575 (1847), upon which *Low* had based its "original package" doctrine. Obviously, if *Low* had misread *Brown* and *The License Cases*, as the *Michelin* Court expressly found, 423 U.S., at 282-283 and 299-301, so did *Hooven I*, and its holding based thereon is no more currently valid than the expressly overruled decision in *Low*.

The Ohio Supreme Court's holding below that petitioner was collaterally estopped by *Hooven I* from as-

sessing Ohio's nondiscriminatory ad valorem property tax against respondent's imported raw materials held for use in manufacture necessarily adopted the legal principle upon which *Hooven I* was based, the "original package" doctrine. Because the opinion below resurrects the "original package" doctrine expressly repudiated in *Michelin*, it is in direct conflict with *Michelin*. This attempt to resurrect the "original package" doctrine after its burial in *Michelin* must be rejected, just as this Court rejected such an attempt in *Washington Revenue Dept. v. Association of Washington Stevedoring Cos.*, *supra*, at 760.

There is no logical or legal justification which would support a retention of the "original package" doctrine in cases involving imported manufacturing inventory while applying the fundamentally different analysis of *Michelin* in cases involving imported goods held for resale. The reasoning underlying *Michelin's* abandonment of the "original package" doctrine is just as compelling with respect to imported manufacturing inventory as it is to imported goods held for resale. To allow manufacturers who use imported raw materials to retain their immunity under the "original package" doctrine and thus avoid contributing their share of the state's cost of providing its various services to all those within its borders would accord such manufacturers preferential treatment resulting in an unfair competitive advantage over manufacturers who use domestic raw materials. Such a result is counter to the express language in *Michelin* that the Import-Export Clause cannot be read to accord preferential treatment to imported goods. 423 U.S., at 287. Any attempt to distinguish *Michelin* because it involved imported goods held for resale is also inconsistent with the holding in *Hooven I* that whether the imported goods were held for resale or

for use in manufacturing was not relevant to a determination of their immunity from taxation under the Import-Export Clause. 324 U.S., at 667-668.

The opinion below represents the first time since this Court's decision in *Michelin* that the highest court of a state or a federal court has barred the assessment of a nondiscriminatory state ad valorem property tax against imported goods as being in violation of the Import-Export Clause. By granting this Petition, this Court can reject this potentially far-reaching opinion before it spawns voluminous litigation throughout the states on what had been considered by the states to be a settled issue after *Michelin*.

2. The Decision Below Failed to Properly Apply This Court's Decision in *Commissioner v. Sunnen*.

In its decision holding that petitioner was barred by the doctrine of collateral estoppel from assessing respondent's imported raw materials held for use in manufacture, the Ohio Supreme Court failed to properly apply this Court's decision in *Commissioner v. Sunnen*, *supra*, that collateral estoppel is "confined to situations . . . where the controlling facts and applicable legal rules remain unchanged." 333 U.S., at 599-600. The doctrine is inapplicable when an intervening decision of this Court modifies the controlling legal principles upon which the first decision was based. The reason for the limitation was the concern that such a modification could render a prior decision inconsistent with the current legal theory and that if that prior decision is perpetuated by applying collateral estoppel the taxpayer involved in that prior litigation will be treated differently from other taxpayers in the same class. *Id.*, at 599; *Montana v. United States*,

440 U.S. 147, 161 (1979); 1B *Moore's Federal Practice* § 0.422, at 3042, § 0.422 [5] , at 3451. The obvious rationale of this limitation on the applicability of collateral estoppel is equality and uniformity in the treatment of taxpayers. Although the opinion below does not clearly and definitively articulate the precise reason for not limiting the application of collateral estoppel[1], the effect of the decision is clear. It will result in "inequalities in the administration of the revenue laws, discriminatory distinctions in tax liability, and a fertile basis for litigious confusion," the avoidance of which was the fundamental reason for the limitation on the doctrine of collateral estoppel enunciated in *Sunnen*, 333 U.S. at 599.

If left standing, the Ohio Supreme Court's decision barring petitioner from assessing Ohio's nondiscriminatory ad valorem property tax against respondent's imported raw materials will result in respondent avoiding forever the tax on its imported raw materials inventory because of a prior decision, *Hooven I*, which was based on a now repudiated legal principle, the "original package" doctrine, while all other taxpayers would be subject to that tax on their imported raw materials inventory under the fundamentally different legal principles enunciated in *Michelin*.[2] Respondent alone would be perpetually im-

[1] As an example, while the Ohio Supreme Court apparently acknowledged that *Michelin* repudiated the "original package" doctrine, at n. 1 of its Opinion (A – 6), which indicates that it recognized that *Michelin* had changed the controlling legal principles in Import-Export Clause cases, its finding that *Hooven I* was of continued vitality subsequent to *Michelin* runs counter to that indication.

[2] Petitioner's argument that *Michelin* changed the controlling legal principle upon which *Hooven I* was decided, the "original package" doctrine, is fully addressed in the immediately preceding part of this Petition.

mune from such taxation, while all other taxpayers would subsidize the services and benefits provided by Ohio to this one taxpayer, a result not countenanced by the *Michelin* Court. 423 U.S. at 287, 289. Respondent would be accorded a distinct competitive advantage over other manufacturers, a result directly contrary to the admonition in *Sunnen* that collateral estoppel is not to be blindly applied where, because of an intervening change in the controlling legal principles, to do so would cause tax inequality.

Such a result would raise serious questions regarding discriminatory application of the tax laws and may well result in litigation by those manufacturers who are subject to the tax. The decision below may also result in litigation by other manufacturers who had received judicial determinations issued prior to *Michelin* declaring that their imported goods were immune from taxation under the Import-Export Clause. It must be assumed that a substantial number of such decisions were issued during the one-hundred plus years that the "original package" doctrine was considered to be controlling in Import-Export Clause cases.

The failure of the Ohio Supreme Court to properly apply this Court's decision in *Sunnen* and the importance of avoiding both the widespread tax inequality that will result from the decision below and the further litigation that is likely to occur until this matter is settled justify the granting of this Petition.

3. The Decision Below Raises an Issue Regarding the Scope of This Court's Decision in *Michelin* that Will Have Significant Consequences Not Only in Ohio, But Throughout the States, Regarding the Ability of the States To Tax Imported Goods.

While avoidance of the tax inequality that will result from the decision below would itself justify granting certiorari, the potential impact of the decision below on Ohio and other states is much more far-reaching.

The finding of the Ohio Supreme Court that *Hooven I* was of continued vitality even after *Michelin* has serious consequences not just for Ohio but for all states which impose ad valorem property taxes. The potential effect of such a decision is to open the floodgates to litigation by manufacturers which, since *Michelin*, have had Ohio's and other states' ad valorem property taxes levied against all of their manufacturing inventory, including imported raw materials retained in their original packages. Ohio and other states which impose ad valorem property taxes have considered such imported goods to be subject to these taxes since the decision of this Court in *Michelin* repudiated the "original package" doctrine and held that such taxes were not "Imposts or Duties" barred by the Import-Export Clause.[3]

For the past seven years, Ohio, and no doubt other states assessed and collected these taxes from manufacturers on their imported raw materials just as they did with respect to imported goods held for resale. Based on the opinion below, these manufacturers are likely to seek refunds of those portions of their tax payments which were based on the amount of their current operational needs and retained in their original packages and claim deductions

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[3] Less than two months after the *Michelin* decision was issued, petitioner issued Tax Commissioner's Bulletin No. 244 which set forth Ohio's understanding that all imported property no longer in transit was subject to its ad valorem property tax, whether it was held for resale or for use in manufacturing. (A – 25).

on current and future returns for the amount of such inventory.[4]

The decision of the Ohio Supreme Court erroneously limited the scope of this Court's decision in *Michelin* in its finding that *Hooven I* retained its vitality regarding imported raw materials held for use in manufacture. This finding is in direct conflict with the fundamental holding in *Michelin* that a nondiscriminatory state ad valorem property tax is not an "Impost" or "Duty" prohibited by the Import-Export Clause. 423 U.S., at 283. the decision below unsettles a fundamental question regarding the ability of the states to tax imported goods which Ohio and other states perceived as resolved by *Michelin*.

Because of the potentially crippling financial impact that the decision below may have on Ohio and other states, the voluminous litigation that it will generate, the importance of the issue of the breadth of the ability of the states to constitutionally tax imported goods and most importantly, the fact that the decision below di-

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[4] Petitioner makes the representation in her official capacity as Tax Commissioner that subsequent to the decision of the Ohio Supreme Court below numerous requests for refunds have been filed and numerous claims for deductions have been made on current returns based upon that decision and that many more such requests for refunds and claims for deductions are expected based upon statements by taxpayers and various counsel for taxpayers. Petitioner further represents that based on prior years' figures it is estimated that approximately $30 million is collected annually by Ohio alone from the assessment of Ohio's ad valorem property tax against such inventory. Nationwide the figure would be in the hundreds of millions of dollars per year.

rectly conflicts with this Court's decision in *Michelin*, it is essential that this Court grant this Petition and reaffirm the right of the states to impose a nondiscriminatory ad valorem property tax on all imported goods which have come to rest within the state.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the Supreme Court of Ohio.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that the requisite number of copies of the foregoing Petition for Writ of Certiorari have been served on the respondent by forwarding such copies to Michael A. Nims, Kenneth E. Updegraft, Jr., and Charles H. Mollenberg, Jr., Jones, Day, Reavis & Pogue, 1700 Union Commerce Building, Cleveland, Ohio 44115, counsel for respondent, by United States mail, postpaid, this_____day of July, 1983. I further certify that all parties required to be served have been served.

_____

RICHARD C. FARRIN
Assistant Attorney General

APPENDIX

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NO. 82 - 559

THE SUPREME COURT OF OHIO

HOOVEN & ALLISON COMPANY,
APPELLANT AND CROSS-APPELLEE, *v.*

LINDLEY, TAX COMMR.,
APPELLEE AND CROSS-APPELLANT.

OPINION
Decided and Filed April 20, 1983

APPEAL and CROSS-APPEAL
from the Board of Tax Appeals

Appellant and cross-appellee, The Hooven & Allison Company ("Hooven"), is a domestic producer of cordage. In order to manufacture cordage, Hooven imports the requisite raw materials—hemp, sisal, jute and manila—from several foreign countries. Upon arriving in the United States, the materials are transported via rail to Hooven's plant in Xenia, Ohio, where they are inspected and stored in their original packages for future use in the manufacturing process.

In conformity with R.C. 5711.16, Hooven timely filed its 1976 and 1977 personal property tax returns. Relying on the United States Supreme Court's decision in *Hooven & Allison Co. v. Evatt* (1945), 324 U.S. 652 (hereinafter *Hooven I*), Hooven did not list as taxable property on its return the stored imported raw materials. In *Hooven I*, the court had determined that the state's taxation of Hooven's imported raw goods still stored in their original packages violated the Import-Export Clause of the United States Constitution.

Following an audit of Hooven's returns, appellee and cross-appellant, Tax Commissioner of Ohio ("commis-

sioner"), found the value of the imported raw material inventory to be taxable and increased Hooven's tax liability. Hooven subsequently filed an application for a review and redetermination of the commissioner's ruling, arguing that the Import-Export and Commerce Clauses of the United States Constitution preclude, and *Hooven I* collaterally estops, the commissioner from levying state *ad valorem* personal property taxes upon the subject goods. In upholding the assessment, the commissioner answered that the United States Supreme Court's decision in *Michelin Tire Corp. v. Wages* (1976), 423 U.S. 276, permits the imposition of such taxes on imported goods no longer in transit when the taxes are applied in a nondiscriminatory fashion, *i.e.*, in a manner not based on the status of the goods as imports.

Upon appeal, the Board of Tax Appeals reversed the assessment, declaring that, as *Hooven I* had not been overruled, the doctrine of collateral estoppel barred the taxation of the subject imports. The board, lacking jurisdiction, did not consider the constitutional issues which Hooven raised. Thus, on April 16, 1982, Hooven filed a notice of appeal in this court to secure a determination of its constitutional claims.

On April 19, 1982, the commissioner filed his notice of appeal, contesting the board's reversal of the personal property tax assessed against Hooven.

The cause is now before this court upon an appeal and cross-appeal as of right.

Messrs. Jones, Day, Reavis & Pogue, Mr. Michael A. Nims, Mr. Kenneth E. Updegraft, Jr., and *Mr. Charles H. Moellenberg, Jr.*, for appellant and cross-appellee.

Mr. Anthony J. Celebrezze, Jr., attorney general, and *Mr. Richard C. Farrin*, for appelle and cross-appellant.

Per Curiam. In the case at bar, this court must first decide whether the doctrine of collateral estoppel bars the commissioner from imposing an *ad valorem* property tax upon imported raw goods stored by Hooven in its warehouse.

In *Montana v. United States* (1979), 440 U.S. 147, the United States Supreme Court clearly set forth the operational features of the interrelated doctrines of *res judicata* and collateral estoppel. The court therein declared:

"* * * Under res judicata, a final judgment on the merits bars further claims by parties or their privies based on the same cause of action. * * * Under collateral estoppel, once an issue is actually and necessarily determined by a court of competent jurisdiction, that determination is conclusive in subsequent suits based on a different cause of action involving a party to the prior litigation. * * *" (Citations omitted.) *Montana v. United States, supra,* at 153. See, also, *Parklane Hosiery Co. v. Shore* (1979), 439 U.S. 322, 326, fn. 5; *State, ex rel. Westchester, v. Bacon* (1980), 61 Ohio St. 2d 42, 44 [15 O.O.3d 53].

As the instant cause does not involve returns for the same years at issue in *Hooven I,* it is arguable whether the more restrictive doctrine of *res judicata* is apposite here. The applicability of collateral estoppel to the case *sub judice,* however, is undeniable. Both parties to the prior action (the Hooven & Allison Company and the Tax Commissioner of Ohio) are parties to the present, and the ultimate issue decided in *Hooven I* is that now under consideration—whether an *ad valorem* personal property tax may constitutionally be assessed against imported raw materials stored in their original containers for future use.

The commissioner offers this court's decision in

Beatrice Foods Co. v. Lindley (1982), 70 Ohio St. 2d. 29 [24 O.O.3d 68], and *Standard Oil Co. v. Zangerle* (1943), 141 Ohio St. 505 [26 O.O. 82], as precedent for precluding the application of collateral estoppel to the instant action. Both cases, however, are readily distinguishable. In *Beatrice Foods, supra*, the taxpayer improperly essayed to invoke collateral estoppel where the subject issue had not been previously resolved in an adversary proceeding and where the principle argued for had not, through unchallenged operation over a period of time, gained acceptance as law. Similarly, our ruling in *Standard Oil, supra*, is not germane to the instant action as the applicability of *res judicata*, not collateral estoppel, was at issue there. Moreover, in *Standard Oil*, the taxpayer sought to shield property found to be tax-exempt in a prior year because of its then use from assessment in a later year when the property was employed in a different manner.

Nonetheless, despite the inappositeness of *Beatrice Foods* and *Standard Oil*, it must be acknowledged that, at least in the context of tax determinations, the applicability of collateral estoppel is not untempered. As the United States Supreme Court observed, in *Commissioner v. Sunnen* (1948), 333 U.S. 591, at 599-600:

"* * * [C]ollateral estoppel is a doctrine capable of being applied so as to avoid an undue disparity in the impact of income tax liability. A taxpayer may secure a judicial determination of a particular tax matter, a matter which may recur without substantial variation for some years thereafter. But a subsequent modification of the significant facts or a change or development in the controlling legal principles may make that determination obsolete or erroneous, at least for future purposes. * * * [A] judicial declaration intervening between * * * two

proceedings may so change the legal atmosphere as to render the rule of collateral estoppel inapplicable. * * * "

The commissioner argues that the United States Supreme Court's decision in *Michelin Tire Corp. v. Wages, supra* (423 U.S. 276), so altered the "legal atmosphere" relative to the constitutionality of personal property taxation of imports as to eviscerate Hooven's collateral estoppel claims. We strongly disagree.

Although the *Michelin* court clearly felt no compunction in explicitly overruling *Low v. Austin* (1871), 80 U.S. 29, the commissioner asks us to hold that that same court experienced a sudden diffidence and only tacitly overruled *Hooven I.* We are thus requested, in effect, to infer an implicit or "constructive" overruling. This we cannot do. Though twice citing *Hooven I* in its *Michelin* decision, the United States Supreme Court made no effort to overrule the former. See *Michelin Tire Corp. v. Wages, supra,* at 281, 301, fn. 13. The court's action—or inaction—must be accorded conclusive effect, at least in regard to its intent in reappraising its earlier ruling in *Hooven I.*

Moreover, that the *Michelin* court did not attempt to overrule *Hooven I* should be evident given the factual distinctiveness of the two cases. In *Michelin,* the court upheld the constitutionality of a state *ad valorem* property tax levied upon imported tires that had been mixed with domestically manufactured ones and stored for future sale and delivery to various franchised dealers, without regard to the tires' point of origin.[1] *Hooven I,*

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[1] In *Michelin,* the court additionally overruled *Low v. Austin, supra,* to the extent the latter interdicted the imposition of state taxes of any type upon imported goods, particularly the levying of *ad valorem* personal property taxes. *Michelin* has also been viewed as sounding

however, involved the validity of a state personal property tax assessed against, not imported finished goods ready for sale, but imported raw materials stored in their original packages for later use in the manufacturing process. Indeed, the court, in *Michelin*, specifically reserved judgment on the taxability of imported tire tubes still in their original cartons and segregated from their domestic counterparts, the issue most analogous to that presented in the herein action.[2] Thus, the commissioner's contention that the holding in *Michelin* controls the disposition of the case at bar must fail.

The United States Supreme Court's decision in *Youngstown Sheet & Tube Co. v. Bowers* and *United States Plywood Corp. v. Algoma* (1959), 358 U.S. 534, also attests to the continued vitality of *Hooven I*. In *Hooven I*, the court declined to consider whether the taxpayer's inventory of imported raw goods was so integral to its daily manufacturing process that the goods lost their status as imports and, thus, became susceptible to state property taxation. In *Youngstown Sheet & Tube*, *supra*, wherein guidelines for making such a calculation are

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[1] continued

the death knell for the "original package" theory, *i.e.*, that imports still in their original containers are immune from all forms of state taxation. *Michelin Tire Corp. v. Wages*, *supra*, at 297.

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[2] As the court stated, in *Michelin Tire Corp. v. Wages*, *supra*, at 279, fn. 2: "The respondents [Gwinnett County, Georgia, Tax Commissioner and Assessors] did not cross-petition from the affirmance of the holding of the Superior Court that the tubes in the corrugated shipping cartons were immune from the tax, and that holding is therefore not before us for review."

established, *Hooven I* was explicitly distinguished. The court stated: "Unlike *Hooven*, these are not cases of the mere storage in a warehouse of imported materials intended for eventual use in manufacturing but not found to have been essential to current operational needs." *Youngstown Sheet & Tube Co. v. Bowers, supra,* at 544. Clearly, the United States Supreme Court has issued no decree that invalidates its decision in *Hooven I.*

The commissioner's attempt to distill from *Michelin* a rigid and unassailable principle which would permit the taxation of imported raw materials, like those represented in the case at bar, is inappropriate, In *Brown v. Maryland* (1827), 25 U.S. (12 Wheat.) 419, which still contains the preeminent judicial analysis of the Import-Export Clause of the federal Constitution, Chief Justice Marshall disdained the adoption of an inflexible rule for determining which forms of state taxation of imported goods the clause proscribes. In discussing the prerogative of the state to levy such taxes under the clause, he stated:

"* * * The power, and the restriction on it, though quite distinguishable when they do not approach each other, may yet, like the intervening colours between white and black, approach so nearly as to perplex the understanding, as colours perplex the vision in making the distinction between them. Yet the distinction exists, and must be marked as the cases arise. Till they do arise, it might be premature to state any rule as being universal in its application.* * *" *Brown v. Maryland, supra,* at 441. The United States Supreme Court has, in short, decreed that no single prescription can adequately treat the constitutional issues raised by state taxation of various imported goods. Thus, the commissioner's attempts, through a misplaced reliance on *Michelin* to do so, must be rejected.

Finally, it has been suggested that we ignore the dictates of *Hooven I* as *Michelin* indicates at the very least the United States Supreme Court's intention presently to abandon the principles embodied in the former action. Were this court to comply with such a request, we would be guilty of overreaching. As was cogently stated in *Penfield Co. of California v. SEC* (C.A. 9, 1944), 143 F. 2d 746, at 749, certiorari denied (1944), 323 U.S. 768:

"We cannot agree that an inferior federal court may make its prognostication of the weather in the Supreme Court chambers, however well fortified in judicial reasoning, and forecast that the Supreme Court 'seems' about to overrule its prior decision, and outrun that Court to the overruling goal." Like the federal district and appellate courts, we are constrained to abide by the decisions of the nation's highest court until expressly overruled by that tribunal.

Finding the commissioner's levying of an *ad valorem* personal property tax upon the subject imported goods barred by the doctrine of collateral estoppel, we decline to address the constitutional issues raised by Hooven in its appeal.

Accordingly, the decision of the Board of Tax Appeals is affirmed.

Decision affirmed.

CELEBREZZE, C.J., W. BROWN, SWEENEY, LOCHER, HOLMES, C. BROWN and J.P. CELEBREZZE, JJ., concur.

BOARD OF TAX APPEALS
STATE OF OHIO

The Hooven & Allison Company,
Appellant,

vs.

CASE NOS. 79-C-637
79-C-638
(PERSONAL PROPERTY TAX)

Edgar L. Lindley,
Tax Commissioner of Ohio,
Appellee.

DECISION AND ORDER
Filed March 19, 1982

REPRESENTATIVES:

For the Appellant - Jones, Day, Reavis & Pogue
By: Diane L. Beauchesne
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1700 Union Commerce Building
Cleveland, Ohio 44115

For the Appellee - William J. Brown
Attorney General of Ohio
By: Richard Farrin
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30 East Broad Street
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Case Number 79-C-637 and Case Number 79-C-638 came on to be considered by the Board of Tax Appeals upon notices of appeal filed herein by the above named appellant on November 14, 1979. Said appeals are taken from a final order of the Tax Commissioner, dated October 17, 1979. The final order is evidenced by Certificate of Determination No. 14690 and relates to a personal property tax assessment for years 1976 and 1977.

The Tax Commissioner's final order in these matters reads as follows:

> "This proceeding, being the application of Hooven & Allison Company, Xenia, Greene County, Ohio for review and redetermination of the personal property tax assessments for the years 1976 and 1977, after being duly heard, came on to be considered for final determination.
>
> "The applicant is a manufacturer of cordage, importing certain quantities of raw material (hemp, sisal, jute, manila, etc.) each year from Tanzania, Ecuador, Kenya, Thailand, Bangladesh, et al. Such imported manufacturing inventory is ordered on credit from foreign producers and shippers through their brokers in various U.S. coastal cities, who then arrange for its transport by ocean-going vessel to the United States. Upon arrival in this country, the imports are transported overland by rail to the applicant's Xenia plant. At the Xenia plant, the bales of raw materials are placed in a warehouse and inspected, with payment then being made to the broker by pro forma invoice; any weight variations or quality grade differences discovered upon inspection result in a claim for partial refund. (However,

whether the materials are subsequently approved as inspected or a claim for damage or misgrading is filed, Hooven & Allison takes title to all the bales of materials when they are boarded overseas on the ocean-going vessels.) After complete tagging and inspection, the imported bales of raw materials are then stored in a dry area in their original packages until placed into production.

"The applicant timely filed its 1976 and 1977 Inter-County Corporation Returns of Taxable Property, reporting therein, *inter alia*, an average value of its manufacturing inventory located in Xenia City, Greene County pursuant to Section 5711.16 of the Revised Code; however, taking the position that its imported inventory, as addressed above, is exempt from taxation under the 'Import-Export' clause of the federal Constitution as long as it remains in its original packages, the applicant excluded such inventory in the computation of the average value of its taxable manufacturing inventory. [1]

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[1] The Applicant included the following footnote in Schedule 3 of its returns: "The inventories represent fibres imported by the taxpayer from foreign countries, held in the original packages in its warehouse in Xenia prior to being used in manufacturing cordage, and when they are removed therefrom or placed in the production line in the factory, such imported fibres so used, or removed from the original package, are thereupon transferred to the Goods in Process, and are included in the taxable inventories in Xenia City. . . the Supreme Court of the United States had held such fibres constitutionally immune from Ohio personal property taxes in the case of *The Hooven & Allison Co. v. Evatt*, 324 U.S. 652 (1945)."

"Upon audit, it was determined that County Auditor Bulletin No. 244, dated March 8, 1976, governed the applicant's 'excluded' imported inventory, and that such inventory, imported from a foreign source, for resale or for use in manufacturing was subject to Ohio's nondiscriminatory ad valorem personal property taxation since it was used in business in Ohio, was no longer in transit in interstate or foreign commerce and had attained a situs in Ohio on the subject tax-listing dates. Accordingly, such imported inventory was included in the computation of the average value of taxable manufacturing inventory pursuant to Section 5711.16 of the Revised Code, resulting in an increased valuation thereof as reflected in amended preliminiary assessment certificates issued pursuant to Section 5711.24 of the Revised Code.

"The applicant object to the increased assessments and timely filed an application for review and redetermination thereof pursuant to Section 5711.31, Revised Code, contending as follows: (1) The State of Ohio is collaterally estopped from assessing the applicant's imported raw materials inventory retained in its original packages on tax-listing date by the United States Supreme Court's decision in *Hooven & Allison Co. v. Evatt*, 324 U.S. 652 (1945). 'Because this decision has not been overruled by the United States Supreme Court (in *Michelin Tire Corp. v. Wages*, 423 U.S. 276 (1976)) it is controlling precedent which is binding on the State of Ohio, its courts and its tax officials.' (parenthetical matter added); (2) The levying of Ohio's personal property tax in

this case operates to impair the federal government's regulation of foreign trade in contravention of the 'Import-Export' clause of the federal Constitution. *Department of Revenue of the State of Washington v. Association of Washington Stevedoring Companies, et al.*, 435 U.S. 734 (1978); The tax in its application acts to inhibit the applicant's importation of fibers from certain countries because it increases the per-pound cost differential between the applicant's U.S. processing and the foreign, internal processing of raw fibers imported from certain third-world nations with state-controlled, planned economies; (3) To the extent that the applicant's imported raw materials inventory exceeds its current operational needs, such excess is not 'used in business' within the context of Section 5701.08 of the Revised Code.

"Upon consideration of the information at hand and under the authority of Section 5711.31, Revised Code, the Tax Commissioner finds that the applicant's contentions are not well taken.

"In January of 1976, the United States Supreme Court held that a state's nondiscriminatory ad valorem personal property taxation of imported goods is not proscribed by the 'Import-Export' clause of the federal Constitution. *Michelin Tire Corp. v. Wages*, 423 U.S. 276 (1976).[2] While not

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[2] See Southwestern U.L. Rev. 7:247-72, Summer '75 and J. Taxation 44:244-5, Ap '76 for analyses of the impact of the *Michelin* decision in the area of ad valorem personal property taxation of imported goods.

specifically reversing *Hooven & Allison, supra*, (which addressed manufacturing rather than merchandising inventory), the following rationale of the *Michelin* decision in the area of a state's nondiscriminatory personal property taxation of imported goods is equally persuasive, whether the goods are held for use in manufacturing or for resale:

> 'Nor will such taxation deprive the Federal Government of the exclusive right to all revenues from imposts and duties on imports and exports, since that right by definition only extends to revenues from exactions of a particular category; if nondiscriminatory ad valorem taxation is not in that category, it deprives the Federal Government of nothing to which it is entitled. Unlike imposts and duties, which are essentially taxes on the commercial privilege of bringing goods into a country, such property taxes are taxes by which a State apportions the cost of such services as police and fire protection among the beneficiaries according to their respective wealth; there is no reason why an importer should not bear his share of these costs along with his competitors handling only domestic goods. The Import-Export Clause clearly prohibits state taxation based on the foreign origin of the imported goods, but it cannot be read to accord imported goods preferential treatment that permits escape from uniform taxes imposed without regard to foreign origin for services which the State supplies.'

"In accordance with such policy, the Ohio Board of Tax Appeals has determined that, as a result of the U. S. supreme Court ruling in *Michelin Tire Corp., supra*, 'it is no longer necessary to determine whether imported goods have become mingled with domestic goods, or have been separated from their commercial unit of shipment, or have otherwise lost their status as imports and, therefore, become subject to state taxation (;) (r)ather, it is sufficient that the goods are no longer in transit and that the property tax sought to be assessed is nondiscriminatory.' *The Hammer Company v. Lindley*, B.T.A. Case No F-448 (April 9, 1979). See also *The Akron Distributing Company v. Lindley*, B.T.A. Case No. E-1593 (September 21, 1978).

"Accordingly, the Tax Commissioner finds no error in the assessments here under review.

"Finding no error in the assessments as heretofore made, it is the order of the Tax Commissioner that such assessments be, and the same hereby are affirmed. Pursuant to the provisions of Section 5711.31, Revised Code, the Tax Commissioner hereby issues this certificate of determination which is his final order with regard to the assessments here under review.

"In conformity with Sections 5711.31 and 5717.02, Revised Code, upon the expiration of thirty days from the date appearing on this certificate of determination, a copy hereof will be forwarded to the Auditor of State or proper county auditor, whichever is applicable."

Appellant's notices of appeal in each case are identical except that they relate to different tax years (1976 and 1977). Appellant's notice of appeal reads, in pertinent part, as follows:

"II. The Appellant specifies that such Certificate of Determination and the assessment shown thereon is erroneous in the following respects:

"1. The Commissioner erroneously included as taxable tangible personal property of Appellant certain raw materials inventory imported by Appellant from foreign sources for use in manufacturing, and retained by it in the original packages on tax-listing date, which was exempt from personal property taxation for the tax year involved.

"2. The Commissioner erroneously determined that the State of Ohio was not collaterally estopped by the United States Supreme Court decision in *The Hooven & Allison Co. v. Evatt*, 324 U.S. 652 (1945) from assessing the Appellant's imported raw materials inventory retained in its original packages on tax-listing date.

"3. The Commissioner erroneously determined that the levying of Ohio's personal property tax upon Appellant's imported raw materials inventory retained in its original packages on tax-listing date does not impair the federal government's regulation of foreign trade in contravention of the 'Import-Export' clause, or of the Commerce clause of the United States Constitution.

"4. The Commissioner erroneously determined that the Appellant's imported raw materials inventory which exceeded its current operational needs was 'used in business', within the meaning of Section

5701.08 of the Revised Code, in Ohio on tax-listing date and subject to personal property taxation under Section 5709.01 of the Revised Code.

"5. The foregoing Determination of the Tax Commissioner upholding the assessment for personal property taxes against Appellant for the Tax Year[s] 1976 [and 1977] is not supported by either the facts or the law, but is contrary to both the facts and the law.

"III. Wherefore Appellant prays that pursuant to Section 5717.02 of the Revised Code, the Board of Tax Appeals

"1. Reverse the Determination of the Tax Commissioner;

"2. Vacate the deficiency assessment against Appellant for personal property tax for the Tax Year[s] 1976 and [1977];

"3. Find and determine that the deficiency assessment for personal property taxes against Appellant for the Tax Year[s] 1976 [and 1977] is erroneous and illegal and that Appellant is not liable for such deficiency assessment; and

"4. Grant to Appellant such other and further relief to which it may be entitled.

"IV. Appellant hereby applies to the Board of Tax Appeals to order that a hearing of argument and evidence (in addtion to the record and evidence required to be certified to the Board of Tax Appeals by the Tax Commissioner) be held, pursuant to Section 5717.02 of the Revised Code."

(Bracketed material added by Board)

This matter was submitted to the Board of Tax Appeals upon the notices of appeal, the statutory transcript filed by the appellee pursuant to Section 5717.02, Ohio Revised Code, and the briefs submitted by counsel for the parties and other evidence. By agreement of the parties, the evidentiary hearing before this Board has been waived.

These matters have been consolidated, sua sponte, for resolution.

Appellant, the Hooven & Allison Company, (hereafter HAC) is an Ohio corporation with its principal place of business being located in Xenia, Ohio. Further facts about HAC and additional information as to the origination of these appeals are stated by appellee in his Certificate of Determination. Said Certificate of Determination has heretofore been reproduced and therefore, there exists no need to do so again.

At pages 6 and 7 of HAC's Requested Findings of Fact and Brief of Appellant, it is noted that two issues are presented in this appeal. They are:

> "1. Is the State of Ohio collaterally estopped by the decision of the United States Supreme Court in *Hooven & Allison Co. v. Evatt*, 324 U.S. 652 (1945), from assessing the personal property tax imposed by Ohio Revised Code Ch. 5711 on Appellant's imported raw materials inventory retained in its original packages on tax-listing day?
>
> "2. In the alternative, does the levying of Ohio's personal property tax upon Appellant's imported raw materials inventory retained in its original packages on tax-listing day impair the Federal Government's regulation of foreign trade

> or disrupt the harmonious relations of the several states in contravention of the 'Import-Export' clause (Article I, § 10, cl. 2) or the Commerce clause (Article I, § 8, cl. 3) of the United States Constitution?"

Further, HAC properly notes, at page 7 of the above brief that:

> "The second issue presented by this appeal is strictly a constitutional question. Although Appellant recognizes that the Board may not consider this question, Appellant is raising it in this action so that it may preserve its specification of error concerning this point."

See: *S.S. Kresge Co. v. Bowers*, 170 Ohio St. 405 (1960).

The first issue concerns the doctrine of collateral estoppel. This doctrine was explained by the Court in *Whitehead v. General Telephone Co.*, 20 Ohio St. 2d 108 (1969). At page 112, the Court stated:

> "The second aspect of the doctrine of *res judicata* is 'collateral estoppel.' While the merger and bar aspects of *res judicata* have the effect of precluding a plaintiff from relitigating the same cause of action against the same defendant, the collateral estoppel aspect precludes the relitigation, in a second action, of *an issue* that has been actually and necessarily litigated and determined in a prior action which was based on a different cause of action. Restatement of the Law, Judgments, Section 45, comment (c), and Section 68 (2); *Cromwell v. County of Sac* (1876), 94 U.S.

> 351. In short, under the rule of collateral estoppel, even where the cause of action is different in a subsequent suit, a judgment in a prior suit may nevertheless affect the outcome of the second suit."

The Court further explained the doctrine of collateral estoppel in the case of *State, ex rel. Westchester v. Bacon*, 61 Ohio St. 2d 42 (1980). At page 44, the Court stated:

> "*Res judicata* is the sole basis given for the decisions below. In order for a prior decision to act as a bar there must be identity of parties or their privies and identity of issues. *Whitehead v. Genl. Tel. Co.* (1969), 20 Ohio St. 2d 108. If the prior cause of action involves identical issues, then that prior cause of action is conclusive of the rights, questions and facts in issue as between the parties or their privies. If identical causes of action are involved, the prior action is *res judicata*. If different causes of action are involved but some issues are identical, the earlier decision can be used to bar litigation of identical issues in the later case under the doctrine of collateral estoppel."

Further, the Court in *State, ex rel. Westchester* spoke to the impact of a change in circumstances as to collateral estoppel. The Court stated:

> "In *Trautwein, supra*, this court ruled that where the material issue had been disposed of in an earlier action, an alleged change of circumstances did not necessarily prevent the doctrine of *res judicata* or collateral estoppel from barring a later cause of action. Where, however, there

has been a change in the facts in a given action which either raises a new material issue, or which would have been relevant to the resolution of a material issue involved in the earlier action, neither the doctrine of *res judicata* nor the doctrine of collateral estoppel will bar litigation of that issue in the later action."

(at page 45)

Here, HAC argues that appellee is collaterally estopped by the decision of the U.S. Supreme Court in *Hooven & Allison Co. v. Evatt*, 324 U.S. 652 (1945), (hereinafter *Hooven I*) from assessing the personal property tax for tax years 1976 and 1977 imposed on HAC's imported raw materials inventory retained in its original packages on tax listing day. The facts relied on by HAC are stated at pages 12 and 13 of its primary brief. There it is stated:

"In 1945, the United States Supreme Court found that Appellant was the importer of raw materials under contracts that it entered into with the United States brokers of foreign producers and shippers of those materials (*Hooven & Allison Co. v. Evatt, supra* at 664). The Certificate of Determination of the Tax Commissioner appealed from herein states that Appellant imports the raw materials in question (S.T. 60). The Certificate of Determination admits that these raw materials '[a]fter complete tagging and inspection, . . . are. . .stored in a dry area in their original packages until placed into production' (S.T. 60), as were the imported raw materials of Appellant that the Supreme Court in 1945 held to be immune from property taxation (*Hooven & Allison Co. v. Evatt, supra* at 654).

"At no point does the record dispute that the facts of importation, storage and use in 1975 and 1976 of the imported raw materials which the Tax Commissioner now seeks to subject to the Ohio personal property tax are identical in all material respects to those upon which the Supreme Court of the United States decided in 1945 that similar inventory of Appellant present in its warehouse in 1938, 1939 and 1940 was constitutionally immune from the imposition of the same Ohio personal property tax under the Import-Export clause of the United States Constitution. Indeed, in view of what has been stated above, one could scarcely dispute this point. The pertinent facts for 1975 and 1976 are simply no different from those that were at issue in the earlier years which were before the United States Supreme Court in *Hooven & Allison Co. v. Evatt.*"

The evidence before the Board of Tax Appeals establishes that the parties involved in this matter are identical to those involved in *Hooven 1.* The taxability of raw materials issue involved in the case at bar was also an issue in *Hooven 1.* The raw materials and the type of taxation involved in this cause are identical to those involved in *Hooven 1. Hooven 1* has not been reversed by the U.S. Supreme Court and thus, has the force and effect of law. Under the doctrine of collateral estoppel, litigation of the instant [taxability of the involved raw materials] issue is barred in this matter and the exemption from taxation was improperly held to be unavailable.

Accordingly, it is the decision and order of the Board of Tax Appeals that the decisions of the appellee in Case Numbers 79-C-637 and 79-C-638 should be, and hereby are, reversed.

I hereby certify the foregoing to be a true and correct copy of the action of the Board of Tax Appeals of the State of Ohio, this day taken, with respect to the above matter.

/s/ Robert E. Boyd, Jr.
Chairman

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DEPARTMENT OF TAXATION OF OHIO

Bulletin No. 244

March 8, 1976

TO: ALL COUNTY AUDITORS

FROM: Edgar L. Lindley, Tax Commissioner

RE: Personal Property Taxation of Foreign Imports

A recent decision of the United States Supreme Court has drastically changed the applicability of the Ohio personal property tax to property imported from foreign sources.

In *Michelin Tire Corp. v. Wages, Tax Commissioner*, et al., January 14, 1976, 96 S. Ct. 535, 46 L. Ed. 2d 495, the United States Supreme Court held that personal property imported from a foreign source is subject to a state's non-discriminatory ad valorem (property) tax in the same manner as domestic property.

Prior to this decision foreign imports were considered immune from state and local property taxes so long as they had not become a part of the mass of general property within a state. Previously, the determining factors were whether such property was still in the original package in which it was imported or, in the case of goods imported for use in manufacturing, whether such property was necessary to meet the current operational needs of the importer.

As the result of the *Michelin* decision, all property imported from a foreign source, whether it be for resale or for use in manufacturing, is subject to the Ohio personal property tax provided:

1.) the property is used in business as provided by Section 5701.08, Ohio Revised Code, and

2.) the property is no longer in transit in interstate or foreign commerce, and

3.) the property has a situs in a taxing district in Ohio.

All personal property tax returns for the years 1976 and thereafter shall be prepared and filed in accord with these principles.